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COURT OF APPEALS
DIVISION II

2016 DEC -7 AM 10:56

STATE OF WASHINGTON

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

Case No. 49073-1-II

CAVE PROPERTIES, a Washington Partnership and Marcia Wicktom,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND, a Washington municipal corporation,
and JOHN and ALICE TAWRESEY, husband and wife and the marital
community comprised thereof,

Respondents.

BRIEF OF RESPONDENTS JOHN and ALICE TAWRESEY

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I. RESTATEMENT OF ASSIGNMENTS OF ERROR

A. **Assignments of Error**

1. Whether the trial court properly dismissed the Appellant's LUPA and Writ of Review Petitions when:

- a. The City of Bainbridge Island's approval of a latecomer agreement is not a "land use decision" as defined by LUPA?
- b. The City of Bainbridge Island's approval of a latecomer agreement is not quasi-judicial in nature, thereby depriving the Court of subject matter jurisdiction to hear the Petition for a Writ of Review?

B. **Issues Pertaining to Assignments of Error:**

- 1. Is the decision to approve a latecomer agreement a "land use decision" as defined by LUPA?
- 2. Is the decision to approve a latecomer agreement quasi-judicial in nature?

II. RESTATEMENT OF THE CASE

The Tawreseys hereby adopt by reference the Restatement of the Case made by the City of Bainbridge Island in its Response Brief.

III. ARGUMENT

A. Standards of Review

The Court of Appeals reviews the trial court's ruling on a motion to dismiss de novo. *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 257, 359 P.3d 746 (2015). Whether the trial court properly granted the City of Bainbridge Island's Motion to Dismiss involves questions of statutory interpretation. The Court of Appeals reviews issues of statutory interpretation de novo. *Cerillo v. Esparza*, 158 Wn.2d 194, 199, 142 P.3d 155 (2006). Additionally, when a superior court acts in an appellate capacity, as it did in this case by reviewing the Bainbridge City Council's decision, the superior court has only jurisdiction that is conferred by law. *Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005). Thus, before a superior court may exercise its appellate jurisdiction, statutory procedural requirements must be satisfied. *Id.* A court lacking jurisdiction must enter an order of dismissal. *Id.*

B. The Approval of a Latecomer Agreement Is Not a "Land Use Decision" Subject to Review Under LUPA.

The Tawreseys hereby adopt by this reference the Arguments made by the City of Bainbridge Island in its Response Brief.

The Tawreseys further argue the trial court's dismissal should be upheld because the vote on the latecomer's agreement was not a land use decision under RCW 36.70C.020(b).

The only case that has considered whether an agreement, such as the instant Latecomers Extension Agreement, is a land use decision is the very recent unpublished case of *Sims v. City of Burlington*, No. 73608-6-I, 2016 WL 3675835, *1 (July 5, 2016, Div. 1). In *Sims*, the court considered whether latecomer agreement formed under RCW 35.72.040 was a "land use decision under RCW 36.70C.020(b):"¹

"Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and....

With very little analysis the *Sims* court found the decision to approve the latecomer agreement to be a "land use decision under RCW 36.70C.020(b):

¹ The *Sims* court did not consider other possible basis for determining a land use decision under either RCW 36.70C.020(a) or (c).

A “land use decision” means a final determination on a declaratory decision regarding the application to a specific property of other ordinances or rules regulating the development of real property. RCW 36.70C.020(2)(b). The nature of the decision made by the city council is made clear by what was set out in the city council's findings of fact and conclusions of law and by what issues and challenges were raised by property owners both in their written comments and orally at the city council hearing. *The approval of the assessment area* was a final decision under RCW 35.72.040. The city council's determination mandated that should Sims or others decide to develop their property within the assessment area during the period of the latecomer agreement, once executed, they would have to pay assessments for benefits received pursuant to the latecomer agreement. Clearly, this was a land use decision.

Sims v. City of Burlington, 194 Wn. App. at 1048 (2016) (emphasis added).

While RCW 36.70C.020(b) contains different alternative elements, the *Sims* court did not specify which elements it found to support its conclusion the city council's action was a land use decision. The foregoing paragraph suggests the City's “approval of the assessment area” was the key factor in determining its action was a land use decision.

But a closer look at RCW 36.70C.020(b) suggests that merely entering into such an agreement is not a land use decision.

First, the City's approval of the latecomer agreement was not an “interpretative or declaratory decision.” It did not interpret or make declaratory findings, but was simply a decision to approve a contract.

Second, the City's approval of the latecomer agreement was not a

decision related to “zoning.” The latecomer agreement did not change or modify the City’s zoning code, map or comprehensive plan or permitted uses of anyone’s property.

Lastly, the City’s approval of the latecomer agreement did not constitute “*regulating* the improvement, development, modification, maintenance, or use of real property.” Applying the traditional and customary definition of “regulate”², the Latecomer Agreement in no way “fixed, established, or controlled” the rights of any person owning property in the reimbursement area. Notably, this section of the statute does not state the imposition of a fee or charge is a land use decision. Moreover, in the case of Appellants, they are, arguably, entirely unaffected by the Latecomer Agreement because they do not have to connect to the water utility agreement that is the subject of the Latecomer Agreement, but may access other water lines should they apply to improve their property.

Consequently, the City’s approval of the latecomer agreement did not constitute a land use decision under RCW 36.70C.020(b).

C. The Approval of the Latecomer Agreement is Not Quasi-Judicial in Nature.

The Tawreseys hereby adopt by reference the Argument made by

² “Regulate” is defined to mean to “Fix, establish, or control.” Black’s Law Dictionary, 6th ed. p. 1286.

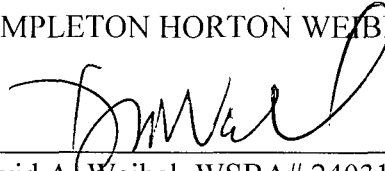
the City of Bainbridge Island in its Response Brief.

IV. CONCLUSION

For the forgoing reasons, Respondent Tawresey respectful request the decision of the trial court dismissing the Appellants' petition be affirmed.

RESPECTFULLY SUBMITTED this 5th day of December,
2016.

TEMPLETON HORTON WEIBEL PLLC

A handwritten signature in black ink, appearing to read 'D. Weibel', is written over a horizontal line.

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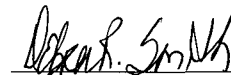
CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on December 5, 2016, a true and accurate copy of the document to which this Certificate is affixed was sent by email transmission and deposited in the mails of the United States of America, by regular mail, postage prepaid, a properly stamped and addressed envelope directed to:

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